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Supreme Court of the United States

OCTOBER TERM—1956

DIESEL TANKER A. C. DODGE, INC., and SPENTON-BUSH FUEL TRANSPORT SERVICE, INC.

Petitioners,

against

J. M. CARRAS, INC., FRANCES E. ELLIOTT, Administratrix of the Estate of JOHN D. ELLIOTT, Deceased, ROBERT PALTER and JOSEPH KOSINSKI.

PETITION FOR WRIT OF CERTIORARI.

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October 8th, 1956.

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The Petition of DIESEL TANKER *A. C. Dodge, Inc.*, and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., respectfully shows:

A.

Citation of the Opinions Below.

The opinion of the United States District Court, Eastern District of New York, is reported at 133 Fed. Supp. 510, sub nom. Petition of Diesel Tanker A. C. Dodge, Inc., owner of the Motor Vessel *A. C. Dodge*, and Spentonbush Fuel Transport Service, Inc., for exoneration from or limitation of liability, and at 1955 *American Maritime Cases*, 1739, sub nom. *The Dodge-The Michael.* It is at pages 12 to 37 of the Record.

The opinion of the United States Court of Appeals, Second Circuit is reported at 234 F. (2d) 374, and at 1956 *American Maritime Cases* 1513, sub nom. Petition of

Diesel Tanker *A. C. Dodge, Inc.*, etc. and is at pages 23 to 28 of this petition.

B.

The Jurisdiction of this Court.

(i) The Judgment of the United States Court of Appeals for the Second Circuit is dated June 7th, 1956 and was entered the same day.

(ii) The Court of Appeals' order denying petitions for re-hearing filed by the petitioners herein and another party, J. M. Carras, Inc., is dated and was filed July 13th, 1956.

(iii) The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254 (1), Act of June 25th, 1948, c. 646, 62 Stat. 298.

C.

The Questions Presented.

1. In an Admiralty collision case involving the Inland Rules of Navigation[1], is a party whose vessel has been held to have violated one of the rules always required to prove "that by no possibility" did the violation contribute to the collision, as the Court of Appeals for the Second Circuit held in this case, or is the burden only to demonstrate a "reasonable probability" that it did not contribute, as held by the Courts of Appeals for the First and Fifth Circuits?

2. Has there been a violation of Rule III of Article 18 of the Inland Rules[2] which requires a vessel to sound a danger signal if she "fails to understand the course or

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[1] 33 U. S. Code, Chapter 3, Sec. 151-231.

[2] See Appendix, 33 U. S. Code, Sec. 203. Also page 4, *infra*.

intention of the other", when there is no proof that the omitting vessel failed to understand the course or intention of the other vessel and no proof that the other vessel's proposed navigation involved danger?

3. When the Trial Court has held that one vessel's negligence played "a major part" in a collision which caused the death of the entire navigating crew of the other vessel, and the latter, unable to defend herself, has been held guilty of minor fault, and the Court of Appeals expressly recognizes the resultant half damage decree as "irrational and unjust", should not the Court of Appeals avoid such result by following the major-minor rule and exonerating the vessel guilty of only minor fault?

In any litigation in any Court in the United States, should an Appellate Court, after full review of the merits, affirm a judgment which it expressly recognizes as "irrational and unjust"?

4. In an Admiralty limitation of liability proceeding involving claims for deaths, personal injuries and property damage, is the comparative negligence rule applicable, or must the Court apply the half damage rule, even though it results in an irrational injustice?

5. When a vessel's master, killed in collision, was in actual charge of her navigation at the time, are not navigational faults attributed to the vessel to be likewise attributed to her master under Admiralty Rule 14, with resultant diminution of the recovery allowed his Administratrix in her Jones Act suit for damages resulting from his death?

D.

Statutes and Rule Involved.

The case involves:

The Inland Navigation Rules, 33 U. S. Code 151-231, particularly Section 203, commonly referred to as Article 18, Rule III, which provides:

> "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle."

Admiralty Rule 14, which reads:

> "PILOTAGE—collision—remedies. In all suits for pilotage or damage by collision, the libellant may proceed *in rem* against the ship and/or *in personam* against the master and/or the owner."

The Jones Act, 46 U. S. C. A., Section 688, which incorporates by reference the Federal Employers' Liability Act, the pertinent parts of both of which appear at pages 21-22 of the Appendix.

E.

Statement of the Case.

The litigation arises from a collision between petitioners' vessel *A. C. Dodge* and the tanker *Michael,* owned by J. M. Carras, Inc., in the Delaware River, about 10:30 P. M., May 25th, 1952, followed by explosions which killed eight of the *Dodge's* nine crew members, sinking her, and caused the immediate death of some and injuries to others aboard the *Michael,* as well as damage to that vessel. Both

were vessels of the United States. The *Dodge* was about 250′ long and the *Michael* about 525′. The *Dodge* was a total loss, the *Michael* repaired.

Invoking the statutory remedy of limitation of liability (46 U. S. C. A. 183 *et seq.*), petitioners, pursuant to the venue requirements of Admiralty Rule 54, instituted a proceeding for exoneration from or limitation of liability in the United States District Court, Eastern District of New York. Claims were filed for the deaths of those killed aboard the *Dodge* and the *Michael,* for injuries by the *Dodge* survivor and nine members of the *Michael* complement, and by J. M. Carras, Inc., owner of the *Michael* for property damage and for indemnification or contribution in respect of third party claims.

Before trial, the *Michael* owner, having settled all but seven of the twenty-one death and injury claims, increased its demand by $750,000 to include the amounts so paid, petitioners having paid nothing toward the settlements. Four other claims having been withdrawn during trial, the Court's decision affected petitioner and the following parties: Frances E. Elliott, Administratrix of the *Dodge's* late master's estate; Palter and Kosinski *Michael* crew members and J. M. Carras, Inc., the *Michael's* owner.

Petitioner Diesel Tanker A. C. Dodge, Inc., had filed a libel in Admiralty against the *Michael* in the United States District Court, District of Maryland, where the *Michael* was, but trial of that action was stayed pending the final determination of this limitation of liability proceeding (Cf. 218 F. (2d) 911, 1955 A. M. C. 706).

The decisions of both Courts below holding the *Michael* and the *Dodge* equally liable, but granting petitioners limitation of liability, will permit the *Michael* to offset against petitioners' substantial claim for the total loss of the *Dodge,* the sums paid by the *Michael* on account of the

death and injury claims, as well as her direct claim for repairs and kindred expenses. The decisions also render petitioners liable to the estate of the deceased *Dodge* master and to the two injured *Michael* seamen, subject to petitioners' right to limit liability.

A passage in the District Court's opinion to the effect that since the *Dodge* was a total loss the *Michael* may not be able to recover from petitioners, is inaccurate. Under the half damage rule which the Court of Appeals considered mandatory despite its recognition of the "irrational and unjust" result, balancing of the damages of the respective vessels gives recognition to and full credit for the *Michael's* damages.

The Circumstances of the Collision.

The following facts, supported by the Trial Court's opinion and findings and developed in the main from the *Michael* crew, establish the *Michael's* numerous faults (each indicated by a number in brackets) which the *Michael* made no attempt to excuse either at trial or on appeal. They also furnish the explanation for the self-evident misgivings of the Court of Appeals in affirming the holding that the *Dodge* was liable to an equal extent with the *Michael* and demonstrate why the Court of Appeals branded the result of its own decision as "irrational and unjust".

Proceeding northward in the Delaware River at full speed of 15½ knots, the *Michael* approached a bend which required a change of course 20° to the right if the *Michael* was to navigate her right side of the channel beyond the bend. While below the bend, the *Michael* observed the red navigating light carried on the *Dodge's* port (left) side, which because of the bend was seen off the *Michael's* starboard (right) bow. The *Michael* sounded one blast of her

whistle (for a left to left passing) and her lookout and helmsman heard one blast from the *Dodge*, but [1] did not report that signal to the *Michael's* master or pilot both of whom, conversing on the bridge [2], were unaware of it. While maneuvering to negotiate the bend, which she reached while the *Dodge* was yet above it, the *Michael's* master caught a fleeting glimpse of the *Dodge's* starboard (right) side green light. Both he and the *Michael* pilot [3] mistakenly thought this indicated the *Dodge* had changed course. Actually the glimpse of the *Dodge's* green light was due to the *Michael's* maneuvers. Immediately on sighting the green light [4], the *Michael's* rudder was changed from hard right, under which she had been swinging around the bend, to hard left, [5] after which the *Michael* sounded a two blast whistle signal but [6] failed to reduce speed. About twenty seconds after her change to left rudder, the *Michael's* bow began to swing left, the interval having been required to overcome the previous right swing. As soon as the left swing began, both master and pilot of the *Michael* realized their error in assuming the *Dodge* had changed course. [7] The *Michael's* wheel was again put hard right and a one whistle signal sounded. Almost immediately the *Michael's* engines were ordered reversed, but [8] no whistle signal was sounded to so advise the Dodge. [9] The reverse engine order was not carried out until moments before the collision, the *Michael* by that time [10] having crossed to her left side of the channel. [11] At collision the *Michael* was forging ahead at the rate of at least ten knots. The *Michael's* stem penetrated the port side of the *Dodge* for a distance of fourteen and a half feet. Explosions immediately followed.

The Decisions.

The District Court found a serious delay by the *Michael* in carrying out the reverse engine order and held that her speed was the "predominant" cause of the collision and her navigation "eccentric" and that she was guilty of other "grievous faults". The Court of Appeals affirmed as to the *Michael's* faults.

The District Court imposed liability upon the *Dodge* on the sole ground that she had violated a statutory obligation (Article 18, Rule III), by not sounding a danger signal when the *Michael* gave her two blast signal. A finding that the *Dodge* did not stop was later corrected in a supplemental opinion.

There was no evidence of the *Dodge's* engine speed when or after she sighted the *Michael,* but the testimony established she was not moving forward at the time of or for about one minute before collision. It is undisputed that when the *Michael* sounded the two blast signal, she had not turned right sufficiently to round the bend and remain on her right side of the channel. There is no testimony that the *Dodge* master failed to understand the course or intention of the *Michael* when the latter sounded the two whistle signal, nor is there evidence that the *Dodge* considered the two whistle signal dangerous. Neither is there evidence that it was unsafe for the vessels to navigate under a two whistle signal at the time the *Michael* sounded it. There is no expert testimony that the *Dodge* should have sounded a danger signal under the circumstances. It is clear that a danger signal if blown by the *Dodge* could have had no other effect than to cause the *Michael* either to revert to the left to left passing, which the *Michael* did within less than one minute without hearing a danger signal, or to order her engines reversed, which the *Michael*

likewise did without hearing a danger signal, but unfortunately the reverse order was not timely executed.

The Court of Appeals would not exonerate the *Dodge*, holding that a duty to sound a danger signal immediately the *Michael* blew two blasts was imposed by statute, although the statute does not so provide. Having judicially extended the statute, the Court of Appeals further held that the *Dodge* must prove "that by no possibility" did the above described violation contribute to the collision, and also stated "We think the *Dodge's* fault was not so minor in character as to justify the application of the minor fault doctrine".

The Court of Appeals also held (one Judge dissenting) that the recovery which the District Court had allowed to the Administratrix of the estate of the master of the *Dodge* should not be diminished by reason of the fault attributed to the *Dodge*, whose master was in actual charge of her navigation at the time of collision.

Reasons for Allowance of the Writ.

1. The decision of the Court of Appeals for the Second Circuit is in conflict with the decisions of Courts of Appeals for other Circuits on the same matter in two respects, viz:

A. Whether a vessel in violation of a rule of navigation must prove "that by no possibility" did the violation contribute, or need demonstrate only "a reasonable probability" that it did not contribute to the collision.

B. Whether the major-minor fault rule should be invoked to exonerate a vessel guilty of only minor fault in a case where a half damage result is expressly recognized as "irrational and unjust".

2. This Court has not settled the important question whether Rule III of Article 18 of the Inland Rules of Navigation, which provides only that a vessel shall sound a danger signal if she fails to understand the course or intention of another, has been violated by a vessel which fully understands the course and intention of the other, but does not give a danger signal immediately the other vessel sounds a signal proposing navigation which, though different than indicated by a previous signal, is nevertheless safe.

3. The action of the lower Courts in entering a decree and judgment perpetuating a result which the Court of Appeals expressly recognized as "irrational and unjust" calls for the exercise of this Court's power of supervision.

4. This decision is in conflict with Admiralty Rule 14, in that it refuses to impose upon the estate of the deceased master of a vessel any responsibility for a collision which occurred while he was in actual charge of her navigation.

5. The important question whether the comparative negligence rule of personal injuries, or the half damage rule of property damage, is applicable in an Admiralty limitation of liability proceeding involving both personal injuries and property damage, has not been settled by this Court.

6. Each of the matters stated above obviously is of great importance to the shipping industry of the United States. The third is important to all citizens of the United States as well as to the subjects of foreign countries, to many of whom all branches of the United States Government are held out as models to be followed.

In many countries the statement of the Court of Appeals that the result of its decision is "irrational and unjust" might be cited as evidence of a decaying democracy, bound and fettered by precedent which is allowed to prevail regardless of the injustice thereby perpetrated.

Amplification.

In recent years this Court's decision in *The Pennsylvania,* 19 Wall 125, 86 U. S. 125, 22 L. Ed. 148, regarding the effect of violation of a rule of navigation, has been the subject of controversial dissention among the various Circuits dealing with Admiralty.

A case closely like the one at bar was *Seaboard Tug & Barge, Inc.* v. *Rederi, AB/Disa,* 213 F. (2d) 772, decided in the First Circuit, June 1954. Describing the argument of one of the parties, the Court of Appeals said (774):

> "• • • They say that the court below having found, as it did, that the *Lia* was guilty of a statutory fault for not blowing a timely danger signal, committed clear error in not finding and ruling that it had not been shown that this fault not only did not, but could not, have contributed to the collision, thereby failing to follow the rule laid down in *The Pennsylvania,* 1873, 19 Wall. 125, 136, 22 L. Ed. 148 wherein it was said that the burden rests upon the ship guilty of an actual violation of a statutory rule of showing 'not merely that her fault might not have been one of the causes (of the collision) or that it probably was not, but that it could not have been.' • • •".

Rejecting the contention, the First Circuit stated in a unanimous opinion (775):

> "We cannot believe that the Supreme Court in *The Pennsylvania* intended to establish as a hard

and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote. Indeed, our interpretation seems to be supported by the decision in *The Umbria,* 1897, 166 U. S. 404, 17 S. Ct. 610, 41 L. Ed. 1053, and we do not see anything in Lie *v.* San Francisco & Portland S.S. Co., 1917, 243 U. S. 291, 37 S. Ct. 270, 61 L. Ed. 726 that militates against it. Notwithstanding the dictum in *The Martello,* 1894, 153 U. S. 64, 75, 14 S. Ct. 723, 727, 38 L. Ed. 637, that the offending ship has the burden of showing that its statutory fault 'could not by any possibility have contributed' to the collision, we nevertheless feel that in applying the rule of *The Pennsylvania* 'we are limited to the reasonable probabilities'. * * *"

See also:

Texas Co. v. *R. O'Brien & Co.,* 225 F. 2nd, 280, 283 (1955).

In March, 1955, the Fifth Circuit said in *Compania De Maderas, etc.* v. *The Queenston Heights,* 220 F. (2d) 120 (at 122):

"We are in accord with the statement of the First Circuit, in Seaboard Tug & Barge *v.* Rederi AB/Disa, 213 F. 2d 772, that the Supreme Court, in *The Pennsylvania,* 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148, did not intend to establish a hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision, no matter how speculative, improbable, or remote."

See also:

Koch-Ellis, Marine Contractors v. *Chemical Barge Lines,* 224 F. (2d) 115 (1955).

In direct conflict with these pronouncements by Circuits with considerable Admiralty experience, is the ruling of the Second Circuit in this case (p. 377, A. 26):

> "* * * For the *Dodge* had the burden of proving that by no possibility did the violation contribute to the collision."

The Third Circuit holds:

> "The law is well settled that when a vessel at the time of collision is violating a statutory rule intended to prevent collisions, the burden is hers to show that her fault could not have been a contributing cause."
>
> *Tidewater Associated Oil Co.* v. *The Syosset,* 203 F. (2d) 264, 267 (1953).

Finding an expression on the point unnecessary to its decision, the Fourth Circuit, in *Mason* v. *Lynch Brothers Co.,* 228 F. (2d) 709, 712, nevertheless recognized the conflict.

In March, 1956, the Ninth Circuit stated this interpretation in *States Steamship Co.* v. *Permanente Steamship Corporation,* 231 F. (2d) 82, at 86-87:

> "The rule of *The Pennsylvania* lays upon the *Permanente Silver Bow* the 'severest' burden of proof to establish that her failure to signal a turn to port made in an end-to-end meeting situation 'could not have been' one of the proximate causes of the collision (citing cases).
>
> "We agree of course that the Supreme Court did not intend in *The Pennsylvania* 'to establish as a

hard and fast rule that every vessel guilty of a statutory fault has the burden of establishing that its fault could not by any stretch of the imagination have had any causal relation to the collision no matter how speculative, improbable or remote.' Seaboard Tug & Barge *v.* Rederi AB/Disa, 1 Cir., 1954, 213 F. 2d 772, 775; accord Compania De Maderas, etc. *v.* The Queenston Heights, 5 Cir., 1955, 220 F. 2d 120, 122.

"The ultimate standard of reasonableness is a constant in our common-law system, and through resort to that standard rules of law expressed in the most absolute terms are made subject to exceptions dictated by reason. Funk *v.* United States, 1933, 290 U. S. 371, 383-385, 54 S. Ct. 212, 78 L. Ed. 369; The Mabel, 2 Cir., 1929, 34 F. 2d 731, 732; Pound, The Spirit of the Common Law, 1921, 182-183.

"Hence we read the phrase 'could not have been' in *The Pennsylvania* to mean that where a ship at the time of a collision is in violation of a statutory rule intended to prevent collisions, the burden of proof rests upon her to establish that the violation could not reasonably be held to have been a proximate cause of the collision.

"Which is to say in effect, as was said in Oriental Trading & Transport Co. *v.* Gulf Oil Corp., *supra*, that in order to escape half damages the ship failing to signal 'must prove beyond reasonable doubt that the collision would have occurred, even though she had blown at the moment when she changed her helm' * * * ".

The foregoing, we respectfully submit, amply demonstrates the crying need for resolution of the sharp controversy on this question, in order that attorneys may properly advise their ship owner clients without need for stating that liability may depend heavily upon the Circuit

in which litigation over a particular collision happens to arise. Considering the transitory nature of vessels and the right of libellants to sue wherever the ship may be, vessel owners and underwriters are presently faced with a serious dilemma.

This decision now imposes upon navigators the obligation to sound a danger signal immediately without time for the exercise of the judgment ordinarily required of ship masters. That Congress intended navigators to use judgment so that collisions might be avoided, rather than precipitated, by strict adherence to the letter of the Navigation Rules, is demonstrated by Article 27 (33 U. S. Code §212), which provides:

> "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

Certainly the master of the *Dodge* was entitled to assume that the *Michael* had good and sufficient reason for sounding a two whistle signal when she did so. Unless the *Dodge* master saw danger in the proposal, no reason appears why he should have sounded a danger signal, when he might well have considered the situation governed by Article 27, *supra* the General Prudential Rule. The District Court and the Court of Appeals, we submit, failed to give the *Dodge* and these petitioners the reasonable benefit of doubt to which any defendant is entitled before being found to have violated a statute.

Having gone beyond all previous decisions by holding that Article 18, Rule III requires the immediate sounding of a danger signal without time for consideration of, or regard for the circumstances, the Court of Appeals then stated (p. 377, A. 27):

> "We think the *Dodge's* fault was not so minor in character as to justify the application of the minor-fault doctrine. The resultant division of damages, half and half, is irrational and unjust. Guided by the Max Morris, 137 U. S. 1, 11 S. Ct. 29, 34 L. Ed. 586, we have held that the more rational doctrine of comparative negligence applies in the case of personal injuries. We cannot do likewise in a case like this."

Other Circuits, by a sensible application of the minor fault rule or an enlightened interpretation of the rule of *The Pennsylvania, supra,* have avoided the need to condemn their own decisions. In *Compania de Maderas, etc.* v. *The Queenston Heights, supra,* the Court said (123):

> "• • • Furthermore, where the active fault of one vessel so flagrantly and heavily outweighs the passive faults of omission of the other vessel, the interests of justice are best served by condemning the more culpable vessel completely. The Great Republic, 23 Wall, 90 U. S. 20, 23 L. Ed. 55 The Lord O'Neil, 4 Cir., 66 F. 77."

See also

Gertrude Parker Inc. v. *Abrams, C. A.,* 178 F. (2d) 259 (C. A. 1);

Theothilatos v. *Martin Marine Transp. Co.,* C. A. 4, 127 F. (2d) 1016 (C. C. A. 4).

The Second Circuit has expressed displeasure with the major-minor fault rule adopted to avoid manifest injustice, stating that it requires courts to gloze over[1] a vessel's venial faults as an unsatisfactory escape from the harsh half damage rule. Much preferable, the Court indicated, is the "more enlightened"[2] rule of apportionment of

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[1] *Oriental Trading & Transport Co.* v. *Gulf Oil Corp.,* 173 F. (2d) 108, 111.

[2] Dissenting Opinion *Ulster Oil Transport* v. *The Matton* 20, 210 F. (2d) 106, 110.

damages applied in personal injury cases in this country[1] and in collision cases in most other civilized nations. Yet, despite its dissatisfaction with the major-minor rule, the Second Circuit followed it in many cases as the only alternative to an equal division of damages. The Court feels itself barred from apportionment of damages otherwise than equally "until the Supreme Court or Congress instructs us otherwise"[2]. (An interesting discussion of the desirability of apportionment will be found in a District Court opinion—*Adams* v. *Construction Aggregates,* 125 F. Supp. 110).

But we believe the Second Circuit has never before refused to apply the major-minor rule when such refusal would have forced it to say of its own decision, as it did in this case, "The resultant division of damages, half and half, is irrational and unjust."

We submit this Court should quiet the doubts and misgivings of the lower Courts and eliminate the conflict among the Circuits, by reviewing this case and making an up to date pronouncement in respect of division of damages on an equal or proportionate basis, or at least settling the conflict among the Circuits regarding the proper application of the rule of *The Pennsylvania* and the major-minor fault rule in order that justice may be accomplished.

Entirely apart from the questions and errors heretofore presented, but of equal general importance to the entire Admiralty jurisprudence, is the decision of the majority of the Court of Appeals on the right of the Administratrix of the estate of the late *Dodge* master to recover from petitioners (his employers) full damages

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[1] *The Max Morris,* 137 U. S. 1.

[2] *Ahlgren* v. *Red Star T. & T. Co.,* 214 F. (2d) 618, 621.

despite the decedent's responsibility for the negligence which forms the basis of petitioners' liability.

Petitioners' liability to the *Michael* owner and the others flowed from its responsibility for the acts of the master of the vessel. Under this Court's Admiralty Rule 14, the master would have been liable for such damages if his estate had been sued. Yet his Administratrix has been granted full recovery for his death which was a consequence of his own act. If his omission to sound a danger signal was properly held to have been negligent, recovery by his Administratrix should have been barred.

The question whether the lower Courts properly applied the law on this issue also merits this Court's review.

Conclusion.

Wherefore, petitioners pray that a writ of certiorari be granted and the proceeding reviewed by this Court.

DIESEL TANKER A. C. DODGE, INC.,
SPENTONBUSH FUEL TRANSPORT SERVICE, INC.,
Petitioners.

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October 8th, 1956.

Appendix.

Pertinent Navigation Rules

Title 33 United States Code, Section 203:

Steam vessels approaching, meeting, or passing one another; banks obstructing view; leaving dock. Art. 18, Rule 1. When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other.

But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel shall answer promptly by two similar blasts of her whistle, and they shall pass on the starboard side of each other.

The foregoing only applies to cases where vessels are meeting end on or nearly end on, in such a manner as to involve risk of collision; in other words, to cases in which, by day, each vessel sees the masts of the other in a line, or nearly in a line, with her own and by night to cases in which each vessel is in such a position as to see both the sidelights of the other.

It does not apply by day to cases in which a vessel sees another ahead crossing her own course, or by night to cases where the red light of one vessel is opposed to the red light of the other, or where the green light of one vessel is opposed to the green light of the other, or where a red light without a green light or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead.

Rule III. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle.

* * * * * *

Title 33 United States Code, Section 210:

Steam vessel in narrow channel. Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel (June 7, 1897, c. 4, §1, 30 Stat. 101).

Title 33 United States Code, Section 212:

Special circumstances requiring departure from rules. Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger (June 7, 1897, c. 4, §1, 30 Stat. 102).

JONES ACT.

Title 46 United States Code Section 688.

§688. Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.

Pertinent sections of the Federal Employers Liability Act.

45 United States Code, Sections 51-60.

Chapter 2. Liability for Injuries to Employees.

§51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is

employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

§53. Contributory negligence; diminution of damages

In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee. Apr. 22, 1908, c. 149, §3, 35 Stat. 66.

Opinion of the United States Court of Appeals, for the Second Circuit.

Before CLARK, FRANK and HINCKS, Circuit Judges.

FRANK, Circuit Judge.

The *Dodge*, as a result of a collision with the *Michael*, exploded, burned and sank. The owner of the *Dodge* instituted a limitation proceeding. Among the claimants were the owner of the *Michael* and the administratrix of the Master of the *Dodge* who lost his life in the disaster. The facts are fully stated in the opinion of the trial judge, reported in D. C., 133 F. Supp. 510. We think his findings were not "clearly erroneous."[1]

The owner of the *Dodge* appeals, asserting that the judge erred in holding the *Dodge* to blame, and in allowing recovery to the administratrix of the *Dodge's* Master.[2]

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[1] Among the findings are these:

The *Michael* blew a one-whistle signal to the *Dodge* for a port passing. The *Dodge* answered with a one-blast acceptance "while the vessels were yet far enough apart to safely effect such a passing. After an interval of about one and one-half minutes, the *Michael* blew a two-blast signal (without reducing her speed) for a starboard passing. The *Dodge* did not answer that signal, nor did she blow a danger signal. Within about one minute or slightly less, the *Michael* blew a one-blast signal for a port passing, and in less than a minute the *Michael* ran down the *Dodge* and sank her. The *Michael* did not blow a danger signal at any time."

Originally the judge concluded: "The *Dodge* was found at fault for having failed to blow a danger signal *and stop* immediately upon the sounding of the two-blast signal by the *Michael*, and that fault contributed to the disaster." [Emphasis added.] On motion of the *Dodge*, the judge deleted the words "and stop." He explained that "there is no evidence in the case concerning the engine movements of the *Dodge*." Thus we have no finding that the *Dodge* either did or did not stop.

[2] Although the *Dodge* was a total loss, its owner has a substantial financial interest. The owner, in its brief, states the following: "Its claim against the *Michael* for the total loss of the *Dodge* is pending in the District Court of Maryland, where *in rem* jurisdiction was obtained (cf. related decision, 2 Cir., 218 F. 2d 911). As

The owner of the *Michael* concedes that the judge correctly held her to blame, but cross-appeals, arguing that the owner of the *Dodge* was not entitled to limitation of liability because the *Dodge*, to the knowledge of her owner, violated the manning statutes,[3] and that this violation contributed to the collision.

1. The *Dodge* argues that the judge erroneously held the *Dodge* at fault for not sounding a danger signal in violation of Article 18, III of the Inland Rules, 33 U. S. C. A. §203, which reads: "If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." The *Dodge* contends that Rule III is inapplicable here because the evidence does not show, and the judge did not find, that the *Dodge* failed to understand the *Michael's* course when the latter sounded her two whistle signal. We rejected such an interpretation of the Rule in the *San Simeon*, 2 Cir., 63 F. 2d 798, 800, 801, where we said, per Judge Learned Hand: "It seems to us that with every allowance the navigation of the *Commercial Mariner* will not pass muster. She ought to have blown an alarm as soon as she got the *San Simeon's* signal (article 18, Rule III, Inspector's Rule I); we are also disposed to think that she ought to have stopped and backed. * * * We hold the *Commercial Mariner* for failing to answer the double blast with an alarm. As to this fault, it is indeed true that the *Com-*

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under the trial judge's decision, which holds the *Dodge* and the *Michael* both to blame, there will be an equal division of all damages, both the *Michael's* and the *Dodge's*. Therefore the effect of his decision is to permit the *Michael* in the Maryland action, where she is a defendant, to offset one-half of her damages against one-half the *Dodge's*. Any balance in her favor collected by the *Dodge* in that suit against the *Michael* will be surrendered in the instant proceeding and will become the *Dodge's* limitation of liability fund for the benefit of other claimants. The *Dodge's* value was in the million dollar range."

[3] 46 U. S. C. A. §§ 222, 223, 235, 673.

mercial Mariner was not in doubt as to the *San Simeon's* intention, and, reading the rule literally, that is the only occasion for the danger signal. But *a fortiori* when the proposed navigation is plainly impracticable, the ship should blow. The *Bergen*, D. C., 108 F. 555, affirmed, 2 Cir., 128 F. 920. It is indeed impossible to say that this would have changed the result, but the fault being the breach of a rule, the *Commercial Mariner* must satisfy any doubts. Such a signal would have told the *San Simeon* that the *Commercial Mariner* thought her navigation dangerous; not being followed by a backing signal it ought to have told her that she was coming on. It is impossible to say what she would have done in this predicament, but it must have appeared to her that the *Commercial Mariner* did not mean to pass under her stern. It is quite possible that she would have slackened speed, as she did when the situation developed more completely. A very little change would have sufficed; the *Commercial Mariner* needed only about seven seconds to escape. Such speculations the law throws upon the vessel which fails in her duty. It seems to us enough to charge her." After indicating that the *Commercial Mariner* was also at fault because she did not stop and back, Judge Hand added: "We do not however find it necessary to put the result upon a failure to stop and back, because the delay in sounding an alarm is enough."[4] See also Merritt, Chapman & Scott Corporation *v.* Texas Co., 2 Cir., 98 F. 2d 719, 721.

2. The *Dodge* further contends as follows: "A danger signal by the *Dodge* at the time of the *Michael's* two whistle signal would have been inappropriate if in fact there was no danger; on the other hand, a two whistle signal by the *Dodge* at a time when the *Michael* was preparing to pass the *Dodge* port to port might have created serious consequences on the *Michael*, if the *Michael's* two blasts were intended for someone else, as the *Dodge* captain might well have thought, at least until investigation proved

[4] Accordingly, the decision did not turn on the ground of the *Commercial Mariner's* failure to stop and back.

otherwise. Consequently if the *Dodge* did not blow any whistle signals after the *Michael's* two, it may be that the decision not to do so was the deliberate exercise of the *Dodge's* navigator's best judgment in the existing circumstances."

But even assuming that the evidence sufficiently disclosed the presence of other vessels or a basis for a reasonable belief by the *Dodge* that they might have been present, we think the contention untenable. In National Bulk Carriers *v.* United States, 2 Cir., 183 F. 2d 405, 408, we said: "Appellee does not now seriously, nor could it plausibly, press upon us, as justification for the master's failure to sound a one-blast signal, his explanation made at the trial that he did not do so for fear of giving rise to confusion and starting the *Rutgers Victory* 'on some unprudent course which would make the situation more serious.' The Rules do not admit of violation for fear of causing confusion. Cf. A. H. Bull Steamship Co. *v.* United States, 2 Cir., 34 F. 2d 614." See also Merritt, Chapman & Scott Corporation *v.* Texas Co., 2 Cir., 98 F. 2d 719, 721: "While we should not care to commit ourselves to the doctrine that it can never be a fault to blow a danger signal, we are at a loss to think of an occasion when it would be. The books do not contain a whisper that it ever is * * *."

3. Since the *Dodge* violated the statute, there is no merit in the suggestion that it is not certain that a danger signal would have enabled the *Michael* to avoid the collision. For the *Dodge* had the burden of proving that by no possibility did the violation contribute to the collision. See The *Pennsylvania*, 19 Wall, 125, 22 L. Ed. 148; The *San Simeon*, *supra*. The *Dodge* did not bear this burden: On the basis of the finding as to the time which elapsed after the *Michael's* two-blast signal, we cannot say that the collision would not have been averted if the *Dodge* had complied with the Rule. The judge therefore correctly concluded, "The *Dodge* was at fault for having failed to blow a danger signal immediately upon the sounding of the two-blast signal by the *Michael*, and that fault contributed to the disaster."

We think the *Dodge's* fault was not so minor in character as to justify the application of the minor-fault doctrine. The resultant division of damages, half-and-half, is irrational and unjust. Guided by The *Max Morris,* 137 U. S. 1, 11 S. Ct. 29, 34 L.Ed. 586, we have held that the more rational doctrine of comparative negligence applies in the case of personal injuries.[5] We cannot do likewise in a case like this.

4. We see no reason to reject the judge's finding that, even assuming the *Dodge* was undermanned, there was "no causal relation between" the "undermanning and her navigation immediately prior to and at the collision." This disposes of the cross-appeal.

5. The judge said that "nothing can be assumed concerning the physical condition" of the *Dodge's* master "with respect to fatigue or otherwise." On that basis, the *Dodge* contends that, if she was at fault, that fault was necessarily ascribable to her Master's negligence, so that his adminstratrix cannot recover from the *Dodge.* To make out this defense, the *Dodge* had the burden of proving the Master's negligence. The record, however, contains no affirmative evidence that the Master was responsible for the fault. For all that appears, quite legitimately, for any one of several reasons not too difficult to surmise, he may not have been on the bridge at the time. Consequently, the judge committed no error in not finding the Master negligent.

Affirmed.

HINCKS, Circuit Judge (dissenting in part).

I dissent but only as to the implications in Point 5 of the majority opinion as to the claim against *Dodge* for the death of its Master made by his administratrix. We have sustained findings that the only fault of the *Dodge* was failure to sound a danger signal and that this failure was

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[5] Ahlgren *v.* Red Star Towing & Transport Co., Inc., 2 Cir., 214 F. 2d 618, 620-621 and cases there cited.

not caused by undermanning. Further, as counsel for the administratrix say in their brief, the collision occurred during the Master's watch and he was the only pilot on board as the *Dodge,* in a narrow channel, was confronted by vessels approaching from an opposing direction. From these facts, I think a conclusion was imperatively required that the Master, who was either on the bridge or should have been there, was responsible for the only fault on the part of the *Dodge* which was proved. On such a conclusion, the claim made by the administratrix should have been dismissed. Instead, without express holding that the *Dodge* was liable to the administratrix, by its decree the court referred the claim (with others) to a Commissioner for a report as to its "amount, validity, and priority." In so doing, I think the court unnecessarily deferred to a later stage a final ruling which should have been incorporated into its interlocutory decree.

FILED
NOV 7 1956
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term—1956

No. 497

DIESEL TANKER A. C. DODGE, INC., and SPENTON-BUSH FUEL TRANSPORT SERVICE, INC.,
Petitioners,

against

J. M. CARRAS, INC., and FRANCES E. ELLIOTT, Administratrix of the Estate of John D. Elliott, Deceased,
Respondents.

BRIEF OF RESPONDENT J. M. CARRAS, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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This petition has, we submit, been filed in an effort to persuade this Court to review again the Trial Court's holding on the facts, adhered to on reargument, affirmed by the Court of Appeals for the Second Circuit, and adhered to despite petition for reargument, that the DODGE could, by the sounding of a timely danger signal, have avoided collision with the MICHAEL.

That the application of the Rules of the Road to a particular factual situation is not an appropriate subject upon which to ask review by this Court was specifically pointed out in *Postal S. S. Corp.* v. *El Isleo*, 308 U. S. 378, 388 (1940):

> "We deal simply with the question presented with respect to the validity of the Inspectors' rules here in question. We hold these rules are not essentially inconsistent with the statute and are valid, both the statutory provisions and the Inspectors' Rules being

designed to promote safety in situations fraught with danger. *We do not pass, or intimate any opinion, upon the particular facts of the instant case, as it is the appropriate province of the Court of Appeals to deal with these.*" (Emphasis supplied.)

The Facts

Since petitioners have presented an account of the facts which in large part ignores or contradicts the Trial Court's opinion and findings of fact,* it is necessary to state briefly the principal findings on which the Courts below found the DODGE in contributory fault for failure to sound a danger signal.

The Court of Appeals affirmed all the Trial Court's findings, summarizing the principal ones bearing on the DODGE's fault as follows (Petition, appendix, p. 23):

> "The *Michael* blew a one-whistle signal to the *Dodge* for a port passing. The *Dodge* answered with a one-blast acceptance 'while the vessels were yet far enough apart to safely effect such a passing. After an interval of about one and one-half minutes, the *Michael* blew a two-blast signal (without reducing her speed) for a starboard passing. The *Dodge* did not answer that signal, nor did she blow a danger signal. Within about one minute or slightly less, the *Michael* blew a one-blast signal for a port passing, and in less than a minute the *Michael* ran down the *Dodge* and sank her.' "

During a period of about a minute the DODGE's silence permitted the MICHAEL to continue in the mistaken belief

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* Petitioners have unaccountably failed to observe the requirement of this Court that copies of the opinions below be appended to the petition (Rule 23(1)(i)) and have not appended a copy of the opinion of the District Court from which the appeal to the Court below was taken. A copy of the Trial Court's opinion is appended hereto.

that a starboard-to-starboard passing was being negotiated. The DODGE's failure to sound the danger signal "immediately" on hearing the MICHAEL's two-blast proposal undoubtedly contributed to the collision (Opinion of the Trial Court, appendix hereto, p. 16a).

FIRST POINT

Since it has been held on the facts, and affirmed on appeal, that "glaring" violation by the Dodge of the statutory requirement to sound a danger signal undoubtedly contributed to the collision, no question arises as to the proper interpretation of the rule concerning burden of proof in cases of statutory fault.

Petitioners' first question urges that there is a conflict between the Circuits as to the degree of the admittedly heavy burden under the rule of *The Pennsylvania* * on a ship guilty of a statutory fault to prove her fault noncontributory.

The Trial Court, with all the evidence before it, did not rest its decision on the burden of proof.

The Trial Court stated emphatically that the causal connection with the collision of petitioners' "glaring" statutory violation "*admits of no doubt*" (Opinion of the Trial Court, appendix hereto, page 16a). By thus finding as a matter of fact a clear causal relation between the DODGE's fault and the collision, the Trial Court met and went beyond the requirements of *all* the cases cited by petitioner as to burden of proof. The Court of Appeals affirmed, saying:

> "On the basis of the finding as to the time which elapsed after the *Michael's* two-blast signal, we cannot say that the collision would not have been

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* 19 Wall. 125.

averted if the *Dodge* had complied with the Rule. The judge therefore correctly concluded, 'The *Dodge* was at fault for having failed to blow a danger signal immediately upon the sounding of the two-blast signal by the *Michael*, and *that fault contributed to the disaster.*' " (Emphasis supplied. Petition, appendix, page 26.)

Petitioners urge a series of cases interpreting the *Pennsylvania* burden as not going beyond "the burden only to demonstrate a 'reasonable probability' that it did not contribute" (Petition, page 2). The Trial Court in the instant case did not find it necessary to rest its decision on a failure of the DODGE to carry *any* burden; it held that the violation *did* contribute *beyond doubt.*

SECOND POINT

The petition suggests no valid reason why this Court should review the finding of the Trial Court, affirmed on appeal, that the failure of the Dodge to sound a danger signal was a "glaring" violation of the Inland Rules.

Petitioners' second question urges this Court to settle what petitioners describe (Petition, page 10) as the "important" question of whether the Danger Signal Rule* would be violated if a vessel failed to blow a danger signal if there were no danger and no doubt.

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* Inland Rules, Art. 18, Rule III (33 U. S. Code § 203):

"If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle."

This is a false issue utterly unrelated to the decisions of the Courts below.

The Trial Court found it "impossible to understand" why an immediate danger signal was not sounded by the DODGE when the MICHAEL blew two blasts for a starboard-to-starboard proposal after a port-to-port passing agreement had been reached and less than two minutes before the vessels were to meet at a bend in a narrow channel (Opinion of the Trial Court, appendix hereto, pages 14a, 16a). We submit that the District Court, affirmed by the Circuit Court, was clearly right, and that if the DODGE's master did not consider the situation dangerous, he was grossly negligent in failing to do so. As the Court of Appeals points out (Petition, appendix, pages 24, 25) in rejecting petitioners' contention, it is well established that even if a vessel is not in doubt as to the meaning of a proposal which is dangerous and "plainly impracticable", it is "a fortiori" obliged by the statute to blow a danger signal. *The San Simeon*, 63 F. (2d) 798, 801 (U. S. C. A. 2d, 1933), *certiorari denied*, 290 U. S. 643. The Danger Signal Rule has been "universally interpreted" in this way, *Merritt, Chapman & Scott Corporation* v. *Texas Co.*, 98 F. (2d) 719, 721 (U. S. C. A. 2d, 1938).

In misstating the issue in an effort to avoid the finding of "glaring" fault under the Danger Signal Rule, petitioners are forced to argue that the MICHAEL's crossed signal did not involve any danger—a hypothetical factual situation *contrary* to the decisions below which, if it *had* existed, would have necessitated the DODGE's condemnation for another statutory fault.

If, as petitioners argue, there had been no danger in the maneuver proposed by the MICHAEL's two-blast signal, in *that* event the DODGE would have been required by the

Rules * to "answer promptly by two similar blasts of her whistle", and would have been in statutory fault for failing to assent, and also in contributory fault for failing to cooperate, *The Hygrade No. 12, Inc.* v. *The Talisman*, 153 F. (2d) 52 (U. S. C. A. 2d, 1946). Thus, even if the false issue presented by petitioners had been before the Court below, the DODGE would still have been condemned. This "issue" is indeed a surprising basis for urging this Court to accept certiorari.

THIRD POINT

This Court should not grant certiorari to review the refusal of the Court of Appeals to apply the minor-fault doctrine to excuse a statutory fault found by the Trial Court to be glaring and undoubtedly contributory.

The fault of the DODGE in this case was neither "slight" nor "doubtful," prerequisites to a holding of major-minor fault. Griffin on Collision (1949) page 505.

As pointed out in the preceding Points of this Brief, *both* Courts below have found petitioners guilty of *clear statutory fault*. *Both* have held that this fault—described by the Trial Court as "glaring"—in fact contributed to the disaster. Under these circumstances the Court of Appeals

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* Inland Rules, Art. 18, Rule I (33 U. S. Code § 203):

"When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other; and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel *shall answer promptly* by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other.

But if the courses of such vessels are so far on the starboard of each other as not to be considered as meeting head and head, either vessel shall immediately give two short and distinct blasts of her whistle, which the other vessel *shall answer promptly* by two similar blasts of her whistle, and they shall pass on the starboard side of each other (Emphasis supplied.)

* * *"

correctly rejected petitioners' effort to evade responsibility for the DODGE's culpable navigation:

> "We think the Dodge's fault was not so minor in character as to justify the application of the minor-fault doctrine" (Petition, appendix, p. 27).

The situation is entirely different from that before the Court in *Compania de Maderas, etc.* v. *The Queenston Heights*, 220 F. (2d) 120, 123 (U. S. C. A. 5th, 1955), in which the Court found it "difficult to perceive" any connection between absence of a lookout on the bow and the collision, and stated, immediately prior to the language quoted by petitioners:

> "Where the gross negligence of one vessel is wholly sufficient in itself to account for the collision, but the other vessel has committed a *technical fault not shown to have contributed to the collision*, and where the error of the latter is minor, doubt as to the latter's conduct will be resolved in her favor. Griffin on Collisions, p. 505." (Emphasis supplied.)

In the present case it has been held that the DODGE's fault was, not "technical", but *"glaring"*; and that *"it admits of no doubt"* that the DODGE's failure to sound an immediate danger signal *"must be deemed to have contributed to the catastrophe"* (Opinion of the Trial Court, appendix hereto, p. 16a).

FOURTH POINT

The fact that the Courts below followed the well established rule of equal division of damages between two vessels in a both to blame collision case provides no basis for a grant of certiorari by this Court.

Petitioners' statement in their fourth question that this is a limitation proceeding involving deaths, personal injuries, and property damage is incorrect at the present

stage. The only claimant remaining in the proceeding aside from the MICHAEL is the Administratrix of the DODGE's deceased master, who the Court of Appeals has held entitled to full recovery against the DODGE.

Under well-settled Admiralty principles the MICHAEL is entitled, as the Courts below held, to include as part of her collision damages payments made on death and personal injury claims and to require the DODGE to share equally all of her damages, including such payments.

The "up to date pronouncement" on this subject requested by petitioners has only recently been made by this Court in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, 284 (1952):

> "Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, *as well as personal injury and property damage inflicted on innocent third parties.*" (Emphasis supplied.)

CONCLUSION

The petition of Diesel Tanker A. C. Dodge, Inc., and Spentonbush Fuel Transport Service, Inc., for a writ of certiorari should be denied.

Dated: New York, N. Y., November 5, 1956.

Respectfully submitted,

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APPENDIX

Opinion of Trial Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

No. A. 19971

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In the Matter

of

The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the Motor Vessel *A. C. Dodge*, and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability.

—o—

July 6, 1955.

MESSRS. FOLEY & MARTIN, Proctors for Petitioners, by CHRISTOPHER E. HECKMAN, Esq., and JOHN H. HANRAHAN, JR., Esq., Advocates.

MESSRS. HAIGHT, GARDNER, POOR & HAVENS, Proctors for SS. MICHAEL, by MACDONALD DEMING, Esq., JAMES M. ESTABROOK, Esq., and GORDON W. PAULSEN, Esq., Advocates.

MESSRS. BRENNER, HANNAN & MURPHY, Proctors for various death and personal injury claimants, by LAWRENCE H. REILLY, JR., Esq., and TIMOTHY V. SMITH, Esq., Advocates.

BERNARD ROLNICK, Esq., Proctor for PALTER and KOSINSKY damage claims.

MESSRS. GREENHILL & GREENHILL and FREEDMAN, LANDY & LORRY, Proctors for various death and personal injury claimants, by WILLIAM ALPER, Esq., Advocate.

THOMAS M. BREEN, Esq., Proctor for various death and personal injury claimants.

BYERS, *D. J.*:

This is a limitation proceeding resulting from the sinking of the laden tanker *Dodge* by the laden tanker *Michael* on June 25, 1952 at about 10:30 p. m. D. S. T. in the upper Delaware River, some miles northerly of its entrance into Delaware Bay. The *Michael* struck the *Dodge* about 25 feet forward of her stern on the port side, at an estimated angle of 45 degrees.

The collision caused an explosion upon the *Dodge* at once, and in the ensuing fire on that ship all hands save one perished, and the ship went down by the stern to the bottom within a few minutes—estimated at three. The fire did not burn itself out for several hours, presumably because the forward floating part of the hulk remained in a vertical position until the contents of the tanks had been consumed.

Eight men lost their lives which means that no testimony on the part of the *Dodge* is available concerning her navigation prior to the collision, since the survivor, Tellefsen, was in the watch below from 6:00 p. m. D. S. T. onward and was rescued from the water into which he was hurled or jumped, after an interval of some hours.

The colliding tanker *Michael* also took fire at once and having pulled away from the *Dodge* after penetrating her hull some 14½ feet on the port side near the stern, her crew under the leadership of the mate, was organized into

a fire fighting effort which successfully functioned so that this ship was ultimately beached and later reached a shipyard for repairs. Two lives were lost on the *Michael,* including that of Gustafsen, the third mate.

This tragic happening was in the making for only about four minutes as nearly as can be computed and, in light of all the testimony was inexcusable.

Since strong reliance is placed by the claimant Carras (owner of the *Michael*) upon the testimony of the captain and pilot of that ship, a word should be said at the outset, of the conditions on board during the first few minutes after the collision.

Those in the wheelhouse at the time were the captain, Amy, the pilot, Lemmon, the third mate, Gustafsen, and the helmsman Sibley; the first three at once left the pilothouse as the result of the crash, while Sibley remained for a brief time at the wheel.

Fire at once burst out on the *Dodge,* and the *Michael* backed out from engagement with her, the engines at that time being in reverse, and the explosion, which at once occurred on the *Dodge,* started a fire on the *Michael.* In the confusion of the moment, there was a delay in sounding the general alarm on the latter but that was done after an estimated interval of three or four minutes.

It is said that ultimately Captain Amy went to the bridge, and two witnesses deposed that the pilot climbed in a lifeboat which was not launched. He denies that he did this, and this recital is not intended to be a finding as to that specific subject.

It is not a cause for wonder that the catastrophe unnerved those who, almost without warning, were required to deal with its effects, but these few moments that bordered upon panic cannot be ignored in appraising the testimony now adduced after a lapse of nearly three years, in which the captain and the pilot have had ample opportunity to reflect and rationalize.

Since the case for the *Michael* is based upon the central theory that the *Dodge* was at fault in the matter of her navigation, it will be convenient to discuss that aspect of the controversy at the outset, because its demonstration or lack thereof is of immediate consequence concerning the right to limitation.

The Parties to the Litigation

Petitioners:

The corporate owner of the *Dodge*, Diesel Tanker A. C. Dodge, Inc. (to be called A. C. Dodge), and the corporate operator thereof (Spentonbush).

Claimants:

The owner of the *Michael*, J. M. Carras, Inc., to be called Carras;

Mrs. Frances E. Elliott, widow of the deceased master of the *Dodge;*

Palter and Kosinsky retained their status as claimants but offered no testimony at the trial;

The claimants August Guerin and the Estate of Guerin, Tellefsen, Dafnos and Allard withdrew their claims before the testimony was closed.

The *Dodge* was a total loss and the owner has abandoned the wreck; it was stated that there was no pending freight because delivery of cargo had to be made in order to earn it.

In effect therefore there is no limitation fund in court, which means that the sole possible redress against the *Dodge* interests may perhaps be that of personal injury claimants (see *Tit. 46 U. S. C. § 183, subd. (b), et seq.*).

The Vessels

Diesel Tanker *A. C. Dodge,* 250′ 6″ by 37′ 1″; depth 14′ 4″; tank capacity 15,800 barrels; h. p. 805; gross tonnage 1,147; net 951.

Tanker *Michael,* 523′ 6″ by 68′ 1″; depth 39′ 1″ tank capacity 140,722 barrels; h. p. 6,000; gross tonnage 10,441; net 6,249.

The waters involved were part of the Delaware River as shown on U. S. Coast & Geodetic Survey Chart No. 294, namely, that reach between the entrance to the Chesapeake & Delaware Canal on the westerly side of the river, on the north, and Liston Point on the south; this means that a portion of the Liston Range, all of the Baker Range, and all of the Reedy Island Range constituted the waters involved.

The channel in those ranges was 800 feet wide except at the southerly end of Reedy Island Range where it merges into Baker Range; here the width is said to have been about 1200 feet in the vicinity of Quick Flashing Light and Bell Buoy "2R", and the navigation of both vessels was confined to the channel according to the credible evidence.

The tide was flood, of a strength of 1½ knots, and there was a light southeast wind; visibility was good, although earlier in the evening there had been showers, and seemingly there was no moonlight to illuminate these waters.

The *Michael* was proceeding up the river with the tide, and the *Dodge* in the opposite direction, and range and running lights were showing.

The mutual approach of these vessels was oblique, as will be seen from the chart.

The Compass Courses

The true compass course from south to north in the various ranges are as follows:

Liston Range	317°
Baker Range	355°
Reedy Island Range	15°

which means that the northbound vessel would make about a twenty degree right turn moving from Baker Range into Reedy Island Range.

The lengths of the ranges are stated, without contradiction, to have been:

	N. M.
Liston Range	12.4
Baker Range	1.65
Reedy Island Range	4.26.

The total of the last two is 5.91.

The vessels' respective speeds over the ground were about:

Michael	15 knots,
Dodge	9 knots.

This means the combined speeds were 24 knots or about 800 yards per minute. Since the distance from the northerly end of Reedy Island Range to the southerly end of Baker was roughly 6 nautical miles, a place of meeting would be reached in near enough to four minutes to indicate the approximate time in which these vessels could have arranged for safe passage port to port in an 800 foot channel.

The foregoing is not contested, and requires no findings.

The *Michael's* Theory Concerning the Navigation of the Dodge

It is urged for the colliding vessel that the navigation of the *Dodge* was faulty in that she veered from her own starboard side of the channel across nearly to the easterly edge, with the probable intention of proceeding on that side of the Reedy Island Range east of buoy 2-R on a shortcut which would save about ten minutes in time and bring her into the Liston Range in the vicinity of buoy 8-L; that course would have opened to the *Michael* the starboard

running light of the *Dodge*, and thus a probable starboard passing with the *Michael*.

In conformity with this theory Lemmon testified that the *Dodge* sank at a place just north of buoy 2-R and to the east of the easterly channel line of the Reedy Island Range.

That testimony is not accepted in the belief that "that wish is father to the thought" for the following reasons:

As has been stated, the immediate effect of the collision and the explosion with accompanying flames and smoke on the *Dodge* was to create such consternation in the wheelhouse of the *Michael* as to render it extremely unlikely that any accurate observations were made as to the place where the *Dodge* sank at the stern within a very few minutes, estimated at three or four, since the fire, first on the *Dodge* and immediately upon the *Michael*, was so devastating that mental reactions as related at the end of nearly three years, cannot now be relied upon; it is no reflection on Lemmon to say that he was more concerned with his own safety than with trying to spot the place of the collision. Captain Amy does not attempt to do so, and his testimony may be quoted:

> "Q. Where did the collision occur? A. It was in the vicinity of 2-R. I didn't watch the buoy too closely as I was watching the vessel rather than the buoy.
>
> "Q. When you say in the vicinity of 2-R, what do you mean by that? Within a half mile of it? A. It could have been above or it could have been below a quarter of a mile either way."

It is to be remembered that 2-R is a flashing red buoy.

It is a reasonable inference from the testimony of the pilot Marshall of the down bound *Socony* (later to be mentioned) that her overtaking and passing of the *Dodge*, which was accomplished just above the northerly end of Reedy Island Range placed the downbound *Dodge* in her own star-

board side of the channel; the respective speeds of these vessels were 10.8 of the *Socony,* and about 9 of the *Dodge.*

Pilot Marshall also of the *Socony* testified as to these speeds:

> "A. I was about two knots faster than she was. It took me 15 minutes to get by her, so about two knots. Her speed would be nine."

The foregoing is thought to mean that while the *Dodge* was at the northerly end of Reedy Island Range she was on the proper side of the channel, and incidentally it may be that the presence of the *Socony* while so passing in those waters, is what caused Lemmon to say at the trial that when the *Michael* was on the Liston Range he saw a (downbound) vessel and he wasn't sure that it was the *Dodge;* thus:

> "There were two vessels—if you want to go into that, sir—
>
> "The Court: Was there any vessel between the *Michael* and the *Dodge?*
>
> "The Witness: There was, yes, sir. That is the reason I say, when I mark that the *Dodge,* I did not know at the time that it was the *Dodge.* I just saw the range lights and side lights of a vessel."

On the assumption that the testimony of Marshall puts the *Dodge* in her own side of the channel within four minutes prior to the collision, no reason has been shown why she should have very quickly altered her course so as to head for the easterly edge; this must be so because the first signal blown by the *Michael* to the *Dodge* was one-blast for a port passing; this means that at the time of that signal there was no eastward heading observable on the part of the *Dodge.*

According to Lemmon, a minute to a minute and a half elapsed before the *Michael* blew a two-blast signal for a starboard passing, and during that interval she advanced

from 500 to 750 yards, and the *Dodge* from 300 to 450 yards.

It is important to realize the significance of that one-blast signal from the *Michael* and her failure to make any other signal for a minute and a half; it points to a then understanding on the part of the navigator of the *Michael* that the *Dodge* was not only in her own waters, but any turning therefrom was not to be anticipated; nor was Pilot Lemmon (whose familiarity with the river and the practices of the vessels navigating upon it must be presumed), who announced any change in the heading of the *Dodge*. It was the Captain, Amy, who was a stranger to the Delaware River; he cried out that the *Dodge* was going left, and in obedience to that ejaculation the *Michael* executed a left rudder and blew two blasts, at Lemmon's order. In other words, the *Michael* was navigated in response to the captain's erroneous judgment as to the apparent course of the *Dodge*.

The foregoing is based upon the versions of both Amy and Lemmon, and also upon the clear and convincing narrative of the helmsman, Sibley.

As Lemmon's testimony was given on the witness stand, it appeared to me that he was entirely uncertain and unconvincing on the subject of whether he ever anticipated that the *Dodge* would take the short cut used by light draft vessels, since obviously he could not even estimate her draft by observing her lights.

The unsoundness of Lemmon's theory as to the possible intention of the *Dodge*—even if he indeed attributed it to her, which I doubt—is exposed by an examination of the chart which clearly indicates that the cut-off route would have been initiated at buoy 4-B and not above 2-R, because the waters just east of the latter are shallow, the indicated depth being 13 feet which was the draft of the *Dodge;* even on a flood tide it is not to be supposed that she would have risked following the course that Lemmon now says she could have intended.

Lemmon admitted that if he had known that the *Dodge* had in fact answered his first on-blast signal with one blast of her own whistle, he would not have navigated as he did. This means I think that he would not have ordered the left rudder and blown the two-blast signal; or stated otherwise, he would not have attributed to the *Dodge* a swing to the east side of the channel.

It is assumed that Amy and Lemmon in the order named did observe the green light of the *Dodge* for a brief interval, for the vessels were within a point or two of being in line; this means that there could have been a brief easing of the *Dodge's* helm which was promptly corrected; also the course of the *Michael* in preparing to round into Reedy Island Range could have been responsible for a shifting in her own post of observation. This is another way of saying that the differences in what was seen by Amy and Lemmon on the one hand and Sibley and Fields on the other, could be accounted for by differences in time and in the position of the *Michael* in the short interval that elapsed between the signals blown by the *Michael,* during which the several observations were made.

It is urged for the petitioners that Lemmon must be wrong as to the place of the collision, because the sunken position of the *Dodge* was at the westerly edge of the channel. That is a circumstance which has its place, but standing alone would not suffice to disprove testimony, because the angle of the collision would impel the disabled *Dodge* in that direction. The blow was inflicted by a ship of 10,441 gross tonnage that was moving at the rate of 10 knots, and the momentum of the impact must have been of great magnitude.

For the reasons stated, it has become apparent to this court that the testimony of Lemmon and Amy is unconvincing to the effect that the *Dodge* departed from her expectable course after the one-blast signal blown by the *Michael;* consequently that the navigation of the *Dodge* is not shown to have been at fault.

FINDING #1: The *Dodge* did not navigate in the easterly side of the channel while proceeding down river in the Reedy Island Range of the Delaware River, on June 25, 1952; nor is her navigation shown to have been at fault prior to the time that she was struck by the *Michael*.

SIGNALS

That the *Michael*, being on Baker Range and somewhere between buoys 4-B and 2-R, blew one blast to the *Dodge* for a port passing, is attested by so many witnesses as to require acceptance without discussion.

Whether the *Dodge* answered with one is in dispute; Amy and Lemmon say that they heard no acceptance. They were in the pilothouse which was enclosed, as will be observed by examining Claimant's Exhibits C, D, and E, but whether the doors at either side and the ports were open during the critical times is not clearly shown by the testimony.

In addition to Lemmon and Amy, the following witnesses testified concerning the whistle signals of both vessels:

Baker, a local resident,
Idzahl, master of the *Socony*, and
Marshall, pilot of the *Socony*, for the claimant,
Sibley, helmsman on the *Michael*,
Fields, lookout on the *Michael*, and
Kilbride, second mate on the *Michael*, for the petitioner.

Baker says that he heard one whistle and then two whistles and then one whistle, and that the third signal was a long whistle that wouldn't quit and that the explosion seemed to come while that was blowing.

Idzahl (*Socony*) said that being about a mile below the *Michael* after having passed that vessel to port, there

was a one whistle blast, then shortly a two whistle blast, and then there was another short one "but the two first ones came from the T-2 tanker and I am familiar with the T-2 tanker when I hear one, but the third one was a different sound again." This testimony does not indicate a one-blast signal given by the *Michael* following two blasts, which both her pilot and captain describe; therefore in this respect is not complete as to the signals blown by the *Michael.*

Marshall says that after passing the *Michael* and when she was just astern of the *Socony,* the *Michael* "sounded one blast of the whistle. * ** after one blast by the *Michael* I cannot say how long elapsed, but it was a good interval, and the *Michael* sounded two blasts. Immediaely following the two blasts I heard one short toot from an airhorn the type of the *A. C. Dodge* who I had just blown into, and heard her answer. It could only be the *Dodge.* There were only three of us in the vicinity. Immediately following that, there was one long blast from a whistle the type of the *Michael.*" A comment made by the witness to the third mate was stricken.

The sequence of signals as so related is not in accordance with the testimony of either Lemmon, Amy or Baker, and is significant in that it attributes a one-blast signal to the *Dodge* after the two blasts from the *Michael.*

Sibley was the helmsman from about 9:40 P. M. and his testimony is clear that at a time when these vessels were approaching from opposite directions, the *Michael* sounded the first signal, namely a one blast; that the next signal was a one blast from the *Dodge,* and thereafter the *Michael* sounded two blasts, which were shortly followed by one blast from the *Michael,* after which he heard no other signals.

Fields was the lookout stationed on the bow of the *Michael* (five years experience at sea, four of which were in the Navy). He first sighted the *Dodge* "coming around

the bend, on the starboard side * * * about a point or a point and a half on the starboard side of the channel." He was posted as lookout about 10:20 p. m. and two or three minutes later he observed the *Dodge*, namely her range and red running lights. He was just going to walk back and report the vessel when the *Michael* blew a one-whistle signal and he heard an answering one whistle from the *Dodge*; " * * * after that the *Michael* sounded a two-blast signal and then she sounded a one-blast signal." He said that the *Dodge* was showing a red light at the time of the interchange of one-blast signals and that when the *Michael* sounded her two blasts the *Dodge* was still showing her red light and as nearly as he could remember the same was true when the *Michael* blew the one-whistle signal following the two.

Kilbride, the second mate, was below, and heard the *Michael* blow one whistle and another vessel answer it and a little later the *Michael* blew two whistles and "the other vessel did not answer. A little while after, the *Michael* blew one whistle and just a little while afterwards the crash."

The testimony of these three witnesses has been weighed in the light of a possible bias on the part of Sibley and Kilbride based upon interchanges between them and Captain Amy during the course of this voyage of the *Michael* from the Persian Gulf.

So far as Kilbride is concerned, his testimony is not deemed to be controlling since both portholes in his cabin were closed at the time that he heard these signals, but for what it is worth I am satisfied from observing him on the witness stand, that such differences as occurred between him and Captain Amy did not cause him to testify falsely in court.

As to Sibley, his deposition as a whole creates the impression that he was an intelligent and quite articulate witness; he owned to differences and interchanges with the captain due to the fact that he was the union repre-

sentative on the ship; however the narrative in his deposition was substantially the same as that that he gave at the Coast Guard hearing a few days after the collision; since he and the lookout, against whom no prejudice seems to be urged, agree to the fact that the *Dodge* gave an answering signal accepting the original one blast for a port passing blown by the *Michael*, the testimony to that effect is accepted by this court.

Not so many years ago it was customary in the admiralty to make allowances for an understandable and somewhat reassuming bias on the part of seamen in favor of their own ship. It is possible that marine union activities have led to a departure from that attitude of an earlier day, but with what impact upon the ultimate cause of truth and veracity may not be entirely certain. The margin of persuasion lies with the *Dodge* as to the acceptance of the one-whistle signal blown by the *Michael*, and findings concerning the whistle signals of both vessels follow.

FINDING #2: While the *Michael* was on Baker Range and between buoys 4-B and 2-R, she blew a one-whistle signal to the *Dodge* for a port passing.

FINDING #3: The *Dodge* answered that with a one blast acceptance while the vessels were yet far enough apart to safely effect such passing.

FINDING #4: After an interval of about one and one-half minutes, the *Michael* blew a two-blast signal (without having reduced her speed), for a starboard passing.

FINDING #5: The *Dodge* did not answer that signal, nor did she blow a danger signal.

FINDING #6: Within about one minute or slightly less, the *Michael* blew a one-blast signal for a port passing, and in less than a minute the *Michael* ran down the *Dodge* and sank her.

FINDING #7: The *Michael* did not blow a danger signal at any time.

FINDING #8: The *Michael* at almost the instant of striking the *Dodge*, put her engines in reverse, but did not blow a three-whistle signal so to indicate.

HELM MOVEMENTS OF THE *Michael*

These must be understood in light of the indicated compass courses on the successive ranges heretofore listed. If the first sight of the *Dodge* on the part of the *Michael* prior to the latter's one-blast signal, actually occurred, as seems to have been the fact, while the *Michael* was yet on the Liston Range, the *Dodge* would have appeared as much as three to four points on the starboard bow of the *Michael*; then as the latter turned from a true compass heading of 317 on the ListonRange, to 345 instead of 355 on the Baker Range, the *Dodge* would seem to be more nearly ahead, namely from a point to a point and a half on the *Michael's* starboard bow. As the latter proceeded up the 1.65 nautical miles of the Baker Range and was about to enter Reedy Island Range, her true compass course would change to 15—a matter of 20 degrees, and it would be important to know exactly how that change was made:

Lemmon says that leaving the Liston Range and entering Baker, the course was 345 to accommodate a possible southbound vessel using the cut-off above referred to, although there was no such vessel in sight at that time; this means that the *Michael* swung somewhat wide in entering the Baker Range, but whether wide enough to see the starboard light of the *Dodge* does not appear, although as the *Michael* continued (passing the *Socony*) the course was changed to 359 at slightly above buoy 4-B, which is about 1600 yards southerly from buoy 2-R, and that was the position of the *Michael* when she blew her one-blast signal to the *Dodge* which Lemmon estimated to be distant about one and one-half miles.

The next change of helm was for a ten-degree right rudder to round buoy 2-R; Sibley reported his helm at 009 and was told to continue swinging and steady at 015, being the Reedy Island compass course, and it was at that time that Lemmon said that the *Dodge* abruptly turned closing out her red sidelight and showing the green light, which he then placed at a point or a point and a half on the *Michael's* starboard bow.

It will be seen that the accuracy of that observation would depend on whether the *Michael* was swinging wide around 2-R or not, because if when she was proceeding up Baker Range her heading was not 355 according to the compass course, but 345 at the outset and later changed to 355, she *could* have been sufficiently to the west to see the starboard light of the *Dodge* even though the latter had made no change in her own heading. This however is so much a matter of conjecture that no finding can be based upon it.

Whatever the precise position of the *Dodge* was thought to be when Captain Amy reported that she was going left, the fact is that Lemmon ordered to helmsman to give a full left wheel and blew two blasts to the *Dodge*. This was done after an interval from the first blast which Lemmon estimates to have been from a minute to a minute and a half.

There was no answer from the *Dodge* to the two-blast signal, and Lemmon says that at the time he was below buoy 2-R, not quite up to it.

It is impossible to understand why at this juncture neither vessel blew a danger signal, but such is the fact, and the fault was mutual and glaring. Since this decision proceeds upon the theory that the *Dodge* had accepted the original one-blast signal from the *Michael*, it was her duty to stop and sound the danger signal immediately after the two-blast signal from the *Michael*, and that her failure to do so must be deemed to have contributed to the catastrophe, admits of no doubt.

The *Michael's* hard left rudder above referred to was ordered while the ten degree right rudder swing was still effective, which means that the *Michael* did not at once swing to her left, but during that movement Lemmon said "the *Dodge* again opened up his mast headlight and range light, closed out his green light, and showed me his broad red * * * about one point on my starboard bow * * * I immediately gave the order to right full rudder, sounded one blast of the whistle, and Captain Amy almost immediately at the same time rang the engine full speed astern by the telegraph."

Incidentally, no bridge bell book has been produced.

Lemmon estimates the interval between the two-blast and the second one-blast blown by the *Michael* was about one minute. Lemmon says that the ships were then about a thousand feet apart; since the engine movement full speed astern did not take effect at once, the *Michael* was making about ten knots through the water when she struck the *Dodge*, so that the collision occurred within much less than one minute from the second one-blast signal, because the vessels were approaching at a combined speed of over 600 yards a minute.

The interval between the *Michael's* two-blast signal and her second one-blast is estimated by Lemmon, as above stated, as about one minute. During which she moved in response to the left, then hard left rudder, but how far no one undertakes to say. Since the channel was about 1200 feet wide at buoy 2-R and the *Michael* was about 500 feet long,she would have to proceed less than three lenghts to be well into the *Dodge's* side of the channel before the helm was again changed to hard right. Sibley says that the ship was still moving left at the time of impact, which would explain the 45 degree angle of collision.

Thus it will be seen that the helm movements of the *Michael* were calculated to cause her to strike the *Dodge* in the latter's own side of the channel which is where the collision occurred as nearly as can be made out from the

testimony, rather than at the place indicated on the chart by Lemmon; and it is so found.

> FINDING #9: The *Michael* struck the *Dodge* while the latter was in the westerly half of the channel at about where Reedy Island Range converges with Baker Range, or slightly to the north.

NAVIGATION OF THE *Michael*

The outstanding aspect of the navigation of the *Michael* is that at no time while this collision was in the making did she arrest her speed, which was from 15 to 15½ knots over the ground, until the order to reverse engines was given above referred to; this means that while she professes to have been in doubt as to the course of the *Dodge* at the end of a minute and a half after her one-blast signal—which leaves 2½ minutes yet to elapse—she did not slacken her speed, which was the plain requirement as the evidence is presently understood.

From the time that she blew her two-blast signal, knowledge is necessarily attributed to her that a condition of peril was in the making if it had not already arisen, and the plainest requirement of caution was to reduce her speed at least to mere steerageway, and no testimony offered for her can be deemed to exculpate her for that fault.

Assuming that the hard left helm and the two-blast signal were about simultaneous, there was a remaining interval in which she was required to blow an alarm, namely,

> "Rule III. If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle." (33 U. S. C. § 203.)

That the *Michael* failed to understand the course and heading of the *Dodge* is clear from the testimony of both

Lemmon and Amy, and why the doubt was not signified on the whistle is one of the mysteries of the cause.

Not only should the *Michael* have blown a danger signal but she should have promptly cut down her speed to steerageway, and the failure to do so between her two-blast signal and her final one-blast must be deemed to have played a major part in the collision.

The *Michael's* ex-parte exposition concerning the navigation of the *Dodge* is held to have failed to persuade. The navigation of the *Dodge* has not been discredited and her own failure to blow the danger signal had nothing to do with her position in her own side of the channel.

> FINDING #10: The *Michael* was grievously at fault: (a) For not reducing her speed at the time of blowing her two-blast signal and stopping if need be, to avoid the peril of collision; (b) For not blowing a danger signal and stopping her engines when she received no answer from her two-blast signal to the *Dodge;* (c) For not blowing a three-blast signal when she reversed her engines just prior to running down the *Dodge.* This was a fault, although probably played no part in the collision.

THE MANNING OF THE *Dodge.*

The claimants seek to defeat limitation by arguing that the *Dodge* was undermanned, with the result that those in charge of her navigation must have been suffering from fatigue. This argument might have weight if the evidence demonstrated faulty navigation on the part of the *Dodge,* but as has been seen such is not the effect of the testimony. Therefore the argument reduced to lowest terms means that the undermanning, if it existed, automatically deprived the *Dodge* of the right to limit, in spite of the fact that she was run down and sunk by the *Michael,* whose eccentric navigation is deemed by this court to have been the predominant cause of the disaster.

The *Dodge* was bound to Baltimore, Maryland, on a trip from Eagle Point, New Jersey, departure having been had at about 6:45 p.m., and the ship's company consisted of the following:

John D. Elliott, Captain;
John W. Elliott, Second Mate (son of the captain);
Charles Hoie, Chief Engineer;
John R. Holmes, First Assistant Engineer;
Ramond E. Anderson, Rasmus S. Kleppe, Howard E. Moller, Sjur Tellefsen, Deckhands;
William O'Brien, Cook.

The First Mate and others of the crew were not on board, presumably because they were taking their ten days ashore out of every thirty days' employment by the ship.

Petitioner's Exhibit 6 is the certificate issued by the Coast Guard, stating the requirements of the number of men to be carried, namely, one master, one chief mate, one second mate, one third mate, four able seamen, two ordinary seamen, one chief engineer, one first assistant engineer, one second assistant engineer, one third assistant engineer and one certificated lifeboat man. There is a typewritten rider attached to the certificate containing a modification, namely,

> "When navigating on Bays, Sounds and Rivers, one first class pilot is required in lieu of three mates and the second assistant and third assistant engineers may be dispensed with. When navigation on Bays, Sounds and Rivers, and if the hours of duty do not exceed 12 of any 24, the following licensed officers and crew are required: One master and pilot, two able seamen, one o. seaman, one chief engineer. When navigating on a Harbor or River route exclusively, deckhands may be carried in lieu of able seamen and the lifeboat man may be dispensed with."

The trip between the points named was a customary run for the *Dodge* at this time, and was usually accomplished via the Chesapeake & Delaware Canal, the river entrance to which will be found on the chart in evidence, whereby the vessel restricted herself to inland waters, namely, bays, sounds and rivers.

On this occasion, however, by reason of the presence of a wreck in the canal, it became necessary to complete the southbound voyage by proceeding down the Delaware River to its mouth, thence in the ocean to Newport News. Therefore it is argued that the quoted restriction from the certificate should not be held to apply to this voyage (although the collision occurred in the river before the voyage was completed), and the *Dodge* must be deemed to have been undermanned because part of the voyage would be coastwise.

That is the view which the Coast Guard took in a proceeding arising out of its investigation into the collision; the result was a fine levied upon the owner of the *Dodge* as for a violation of the controlling statute (Tit. 46 U. S. C. §§ 222, 223, also 235), namely the operation of the *Dodge* on a coastwise voyage without the required crew complement, the deficiency being one chief mate, one second assistant engineer and one ordinary seaman.

A prior fine had been levied in December, 1951 against the owner for a similar violation involved in a voyage which was also partly at sea, testimony concerning which was received, not because it tended to prove anything concerning the issues in this cause, but because it constituted specific notice to the owner of the *Dodge* that a similar deficiency (one chief mate, one assistant engineer, one able seaman and one ordinary seaman) was deemed to constitute a violation of the applicable statute.

The legal effect of the said 1952 holding by the Coast Guard is that there was an administrative finding of a violation of law and regulations promulgated in the public interest; of course that finding does not purport to touch

the question of the navigation of the *Dodge* on this occasion. The subject is referred to only that the record may be complete.

It is assumed but not decided, that the *Dodge* was undermanned for the purpose of a coastwise voyage which had been begun when she left Eagle Point to the knowledge of her owner and operator (Spentonbush).

Much of the discussion in the briefs filed by the claimants has to do with this aspect of the case, and rests upon the proposition that Captain Elliott, who had to act as pilot since his son did not hold a pilot's license for the Delaware River, must have been an overtired and fatigued man. From the nature of the case it will be seen that this is purely argumentative, not evidentiary. Captain Elliott had returned to the *Dodge* but four days before the voyage in question, having taken his ten days' time ashore under a custom prevailing on the ship, which was with the knowledge and acquiescence of the owner.

On May 25th he had been on watch from 6:00 a. m. until 12:00 o'clock noon, and probably during her docking at Eagle Point, which occurred at 2:10 p. m.; his watch began at 6:00 p. m.; and it is assumed that he was navigating his ship from that time until the collision, since he did not carry a license Delaware River pilot; nothing however, can be assumed concerning his physical condition with respect to fatigue or otherwise.

The authorities relied upon by the claimants, namely, *The Denali*, 105 Fed. (2) 413; *N. Y. Marine #10*, 109 Fed. (2) 564; *Moran Towing etc.* v. *U. S.*, 90 Fed. Supp. 623; and *So. Carolina State etc.* v. *U. S.*, 78 Fed. Supp. 598, all involve fault and mishandling by the undermanned vessel, as the result of which limitation was denied upon the theory that there was a direct or causal relationship between that undermanning and the faulty navigation which caused the misadventure present in each cause.

There has been no such demonstration here.

These circumstances are even more favorable from the standpoint of the *Dodge* than those present in *U. S.* v. *Wessel, Duval, etc.*, 123 Fed. Supp. 318 at 337, a Southern District case in which Judge Ryan observed:

> "I find that the violation by Wessel Duval of the statutory requirement that there be three licensed mates aboard in no way contributed to the stranding of the *Edward Rutledge* on the morning of April 15. It is apparent that observance of the statute by the presence of a third mate aboard would not have averted the disaster; in such case 'the non-observance of such rule becomes immaterial.' *The Umbria*, 166 U. S. 404."

In this case, the undermanning was indeed fortuitous, for if the full complement had been carried on the *Dodge*, there would have been two watches below instead of one, with a probable increase in casualties by that margin.

> FINDING #11: There was no causal relation between undermanning which is assumed to have existed on the *Dodge*, and her navigation immediately prior to and at the collision.

PRIVITY

For the sake of completeness, it should be stated that the record presents no problem on this subject. The legal title to the *Dodge* was vested in the corporation first named as a petitioner and she was operated by Spentonbush, etc., also a petitioner; both of them were wholly owned subsidiaries of the parent Bushey Company, Ira S. Bushey & Sons, Inc., and the intercorporate relations, including for the most part identity of officers and directors, were such that knowledge of all operating, manning and other data affecting the navigation and conduct of the *Dodge* are to be attributed to the petitioners, and if need be, to their corporate owner.

The wreck in the Delaware & Chesapeake Canal to which reference has been made was that of a Bushey vessel; consequently the necessity on the part of the *Dodge* to use the route to Baltimore involving some miles at sea had been known to the petitioners for about ten days prior to this disaster. This means that the manning requirements which have been discussed, must be deemed to have been reckoned with by the petitioners.

The testimony of Captain Rossiter, the port captain employed by Diesel Vessel Operators, Inc., another Bushey subsidiary, and that of Mr. Francis B. Bushey, vice-president of the first named petitioner, leaves the Court in no doubt on this general subject, so that if the last finding above made shall be held to be clearly erroneous, the way is open to correction without the necessity for a new trial.

> FINDING #12: The deficiency in the manning of the *Dodge* which has been assumed was with the privity of her owner.

CONCLUSIONS OF LAW

1. The court has jurisdiction of the parties to this proceeding and the subject-matter.

2. The striking of the tanker *Dodge* by the tanker *Michael* on June 25, 1952 at about 10:30 p. m. D. S. T. in that part of the Delaware River which includes Baker Range and Reedy Island Range was the result of faulty navigation on the part of the *Michael* in respect of the matters concerning which the foregoing findings of fact have been made.

3. The navigation of the *Dodge* from the time that she accepted the *Michael's* first one-blast signal has not been shown to have been at fault.

4. The *Dodge* was at fault for having failed to blow a danger signal and stop immediately upon the sounding of

the two-blast signal by the *Michael,* and that fault contributed to the disaster.

5. The undermanning of the *Dodge,* which has been assumed, had no causal relation to the striking of the *Dodge* by the *Michael.*

6. Both vessels were at fault, and this is therefore a both to blame case.

7. The petitioners are entitled to the benefit of limitation in this proceeding.

Settle decree in the usual form, providing for the appointment of a commissioner.

M. W. B.,
U. S. D. J.

Supplement to Opinion of District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

#A. 19971

—o—

In the Matter

of

The Petition of DIESEL TANKER A. C. DODGE, INC., owner of the Motor Vessel *A. C. Dodge* and SPENTONBUSH FUEL TRANSPORT SERVICE, INC., for exoneration from or limitation of liability.

—o—

Sept. 30, 1955.

BYERS, *D. J.*:

The petitioner has moved to resettle the Findings and Conclusions stated in the opinion heretofore filed, and in the following respects the motion is granted:

1. Finding No. 1 is corrected to change the word "June" to "May".

2. Conclusion of Law No. 2 is corrected to change the word "June" to "May".

3. In Conclusion of Law No. 4 the words in the second line "and stop" are deleted, for there is no evidence in the case concerning the engine movements of the *Dodge*.

The proposed findings are argumentative and therefore not proper in form.

To the extent indicated, the motion is granted; otherwise denied.

M. W. B.,
U. S. D. J.

NOV 15 1956

JOHN T. FEY, Cle

Supreme Court of the United States

OCTOBER TERM—1956

No. 497.

DIESEL TANKER A. C. DODGE, INC., and SPENTON-BUSH FUEL TRANSPORT SERVICE, INC.,

Petitioners,

against

J. M. CARRAS, INC., FRANCES E. ELLIOTT, Administratrix of the Estate of JOHN D. ELLIOTT, Deceased, ROBERT PALTER and JOSEPH KOSINSKI.

PETITIONERS' REPLY BRIEF AND APPENDIX.

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Supreme Court of the United States

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PETITIONERS' REPLY BRIEF.

On page 8 of its brief, the respondent owner of the *Michael* states that the only other claimant in the proceeding is the Administratrix of the *Dodge's* deceased master. This is a plain indication that the *Michael* has settled directly with the other damage claimants Palter and Kosinski, and this without the knowledge of petitioners.

In the present state of the case, the *Michael* owner will be able to recoup from the *Dodge,* one-half of the amounts it has paid to accomplish its ex parte settlements of those two claims, as well as the numerous others it settled before trial. That "unjust and irrational" result, we submit, would not have been possible if the litigation had been conducted in any other maritime nation. Most likely it would not have occurred in the First or the Fifth Circuits, and probably not in the Ninth Circuit. It may be avoided in any one of three ways: By an up-to-date interpretation of

the rule of *The Pennsylvania,* in consonance with that enunciated by the First and adopted by the Fifth Circuit: By a proper application of the major-minor fault rule: By division of damages in accordance with the doctrine of comparative fault.

Appended hereto is a not yet reported decision of the Court of Appeals, Second Circuit rendered November 7, 1956 denying a petition for reargument in *Adams* v. *Construction Aggregates Co.* (not yet reported). In that case the Trial Court had originally divided damages 80%-20% but later felt obliged by precedent to decree an equal division (*Cf. Adams* v. *Construction Aggregates,* 125 F. Supp. 110 cited in our petition). Referring to the contention that the equal damage rule is judge-made and may be judge-changed the Court of Appeals said:

> "We have frequently called attention to the inherent injustice of this rule (citing cases). But the rule of equal division of property damage is so well established in this country that it would create intolerable confusion were a court of intermediate jurisdiction such as ours to deviate from it. *We shall, therefore, continue to apply the rule until there shall be authoritative sanction for departure therefrom.*" (Italics supplied.)

We submit that by the above quoted language, the Court of Appeals for the Second Circuit has again plainly suggested the desperate need for a decision by this Court which will terminate the injustices that have resulted from the equal division doctrine.

All courts dealing with the case thus far have recognized the *Michael's* faults as the predominant cause of the collision, yet she will recoup one-half her damages. Unquestionably a jury would have found a way to avoid that

injustice. Yet, up to the present, judges have been bound and fettered by ancient precedent.

Significant, we submit, is the respondent *Michael* owner's reference to the Trial Court decision[1] in an attempt to distract attention from the harsh interpretation of *The Pennsylvania* rule stated by the Court of Appeals. It is obvious, we submit, that the Court of Appeals affirmed the decision only because it considered the decision of this Court in *The Pennsylvania* imposed upon the *Dodge* the almost impossible burden of proving that a technical omission could not possibly have contributed to a collision which indisputably was due almost entirely to positive faults of commission by the *Michael*.

We submit the petition should be granted.

Respectfully submitted,

CHRISTOPHER E. HECKMAN,
Counsel for Petitioners,
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New York 5, N. Y.

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[1] Petitioners believe they complied with Rule 23 because the District Court opinion was included in the record transmitted by the Court of Appeals, nine copies of which were filed.

Appendix.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

No. 307—October Term, 1955.

(Petition filed October 29, 1956 Decided November 7, 1956.)

DOCKET No. 24006

IN THE MATTER

of

The Petition of CHARLES FRANCIS ADAMS, *et al.*, as Massachusetts Trustees of Eastern Gas & Fuel Associates, and, as such Trustees, Owners of the SS. *Melrose*, for exoneration from or limitation of liability,

Petitioners-Appellants.

CHARLES FRANCIS ADAMS, *et al.*, as Massachusetts Trustees of Eastern Gas & Fuel Associates, and, as such Trustees, Owners of the SS. *Melrose*,

Libelants-Appellants,

v.

CONSTRUCTION AGGREGATES CORPORATION,

Respondent-Appellee.

Before:

CLARK, Chief Judge, and HINCKS and LUMBARD,

Circuit Judges.

ON PETITION FOR REHEARING.

KIRLIN CAMPBELL & KEATING, New York, N. Y. (John F. Gerity, Eugene F. Gilligan, and David P. Dawson, of counsel), Proctors for Petitioners-Appellants.

Per Curiam:

This petition, brought by the appellants Charles Francis Adams, et al., trustees, as Owners of the SS. *Melrose,* fails to persuade us to change our decision or modify our opinion.

The contention now made that the damages should be proportioned in accordance with the comparative faults of the colliding vessels, is overruled. In so ruling we do not disagree with the finding below that a division of the damages, 80% against *Sandcraft* and 20% against *Melrose,* would accord with the facts and the equities. However, the trial judge was plainly right in holding that prior decisions of this court required that the damages be equally divided. *Ahlgren* v. *Red Star Towing & Transportation Co.,* 2 Cir., 214 F. 2d 618, 621. We have frequently called attention to the inherent injustice of this rule. *Ahlgren* v. *Red Star Towing & Transportation Co., supra; The City of Chattanooga,* 2 Cir., 79 F. 2d 23. See also dissenting opinion of Judge L. Hand in *Ulster Oil Transport Corp.* v. *The Matton,* 210 F. 2d 106, 110. But the rule of equal division of property damage is so well established in this country that it would create intolerable confusion were a court of intermediate jurisdiction such as ours to deviate from it. We shall therefore continue to apply the rule until there shall be authoritative sanction for departure therefrom.

Petition denied.